FILED
JAN 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-527

In The
SUPREME COURT OF THE UNITED STATES
October term, 1988

MERLIN BISHOP, et al.,
Petitioners,

vs.

GEORGE MICHAEL GWALTNEY, et al.,
Respondents.

On petition for Writ of Certiorari to the California Supreme Court

---

REPLY BRIEF

Thomas M. Burton
5820 Stoneridge Mall Road
Pleasanton, CA 94566
(415) 484-3233

0

QUESTIONS PRESENTED

1. Respondents' assertion that Petitioners did not raise or argue below their theory that the California Highway Patrol was susceptible to an action brought directly under the Constitution itself, is false.

2. Respondents' assertion that they had not been properly served so as to raise an aura of prejudice is disingenuous in that Respondents are well aware that the delays in service resulted either from Petitioners' difficulties in satisfying the Clerk of this court with respect to the proper typing size and style or in the failure of the delivery service to locate Petitioners' counsel absent a suite number, and in no respect involved changes in content with respect to the three sets of petitions successively filed.

TABLE OF CONTENTS

I

LIABILITY OF THE CALIFORNIA HIGHWAY PATROL DIRECTLY UNDER THE CONSTITUTION WAS BOTH PLEADED AND ARGUED BELOW.....1

II

RESPONDENTS ARE NOT PREJUDICED BY THE LATE SERVICE OF THE THIRD RETYPED VERSION OF THE PETITION.....6

III

CONCLUSION.....8

TABLE OF AUTHORITIES

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).....5

Heckler v. Cambell, 461 U.S. 458, 468 n.12. (1983) 6

I
LIABILITY OF THE CALIFORNIA HIGHWAY PATROL DIRECTLY UNDER THE CONSTITUTION WAS BOTH PLEADED AND ARGUED BELOW

Respondents claim that petitioners improperly raised for the first time on appeal the liability of the California Highway Patrol (CHP) directly under the federal constitution. (Resp. Brief, pp. 9-10.) The Court of Appeal used the same pretext as a means of not addressing this important issue, which Petitioners exposed and refuted in their Petition. (Pet., p. 7, n.2.; Appendix, p. 65).

Petitioners First Amended Complaint plead in detail their reliance upon the constitution:

> As a direct and proximate result of the above described unlawful, malicious, deliberate, and reckless acts and omissions of the defendants committed under color of authority as patrolmen of the CHP and while acting in that capacity Robin Bishop suffered grievous bodily harm and loss of life, all in violation of her rights under the laws and Constitution of the United States, and in particular the

Fourth, Eighth and Fourteenth Amendments thereof and 42 U.S.C. §§ 1983. (First Amended Complaint, ¶ 18 incorporated into all causes of action)

The First Cause of Action states:

As a further result of the above described acts, Robin Bishop was deprived of rights and immunities secured to her under the Constitution of the United States and the State of California including, but not limited to, her rights under the Fourteenth Amendment to be secure in her person, to be free from punishment without due process and to equal protection of the laws.

The Second Cause of Action states:

The defendant Gwaltney acted with malice to deprive Robin Bishop of her civil rights and upon the assumption that such conduct was consistent with the policies and practices allowed by the CHP for officers in the Barstow Substation and would not be detected, or if detected, would not be punished by the remaining named defendants all in violation of the Fourth and Fourteenth Amendments of the United States Constitution.

The Third Cause of action states:

> Defendants acted out of malice and in reckless disregard for the civil rights of Robin Bishop; and in violation of the Fourth and Fourteenth Amendments of the United States Constitution.

The Fourth Cause of Action states:

> Had the defendant Gwaltney apprehended a male motorist under the same or similar circumstances, the defendant Gwaltney would not have engaged in the conduct forming the subject matter of this action; all in violation of the Fourteenth Amendment of the United States Constitution.

The Fifth Cause of Action states:

> . . . . .failed to protect Robin Bishop from harm after taking her into the custody of the State of California, but, on the contrary, inflicted on her great bodily harm torture and death, all in violation of the privileges and immunities of United States citizenship and in derogation of the Fourteenth Amendment of the federal constitution.

The Seventh Cause of Action states:

> ...defendants jointly and severally ignored, tolerated, and

tacitly encouraged aggressive sexual behavior by on-duty male officers toward that segment of the female motoring public consisting of young attractive women traveling alone upon federal interstate 15 in and around Barstow California. Defendants' deliberate indifference toward such female motorists, including Robin Bishop, proximately caused the apprehension, torture and death of Robin Bishop in violation of fundamental rights to life and liberty protected by the Fourteenth Amendment of the United States Constitution.

The Ninth Cause of Action states:

....the defendant Gwaltney in the course and scope of his employment by CHP and as part of the policy, pattern and practice established by and carried out by the defendants jointly and severally, by threats, intimidation and force invaded the privacy, deprived Robin Bishop of her freedom and also her life without due process of law, done with malice and in reckless disregard for the civil rights of Robin Bishop and in violation of the Fourteenth Amendment of the United States Constitution.

The Tenth Cause of Action states:

> The plaintiffs and their decedent as citizens of the Unites States enjoy the privilege of interstate travel on the public highways without the interference of discretionary search, seizures and shooting for personal pleasure by officers of the State of California. Plaintiffs also have a fundamental constitutional right to the due process of law in bringing to bear the judgment of the state in apprehending and punishing those persons who are guilty of violating the civil rights of their decedent.

The Court of Appeal acknowledged that Petitioners raised the direct action issue by stating:

> Plaintiffs also contend that the CHP is directly liable pursuant to Bivens v. Six Unknown Fed. Narcotics Agents..., because Bivens allows direct action founded upon constitutional violations where section 1983 is not available. However, we need not decide whether Bivens applies to this case, because plaintiffs' entire complaint was predicated only on section 1983. (Pet Appendix, p. 65)

Finally, Petitioners summarized in their petition, their direct action argument made below (Pet, pp. 8-11)

Respondents' reliance upon *Heckler v. Campbell* for their position that Petitioners may not in their petition urge direct constitutional liability is misplaced, (Opp. Brief, p. 9). Instead, the case merely held that because the Respondent in that case did not raise her due process or regulatory arguments below, the case did not constitute an exceptional one warranting review by this court, 461 U.S. 458, 468, n.12 (1983). In the case at bench, the direct action argument was made extensively below and may, therefore, properly be considered in support of the petition.

II

RESPONDENTS ARE NOT PREJUDICED BY THE LATE SERVICE OF THE THIRD RETYPED VERSION OF THE PETITION

The initial filing of the Petition was made with the Clerk of this court on July 26, 1968. The Petition was returned on or about August 3, 1988 because it had an additional cover page which needed to be removed, because, notwithstanding its having been laser-printed, it was regarded as a form of typewriting and was not double spaced, because all parties not spelled out on the cover page

needed to be separately listed, and because the appendix was not double spaced.

The corrected Petition was mailed back to the Clerk and served on August 26, 1988, but was again returned because the court of appeal opinion in the appendix, being this time a reduced photocopy, was no longer considered double spaced or able to satisfy the margin width requirements.

A third corrected version with a retyped appendix was mailed back to the clerk with instruction to the copying service to send by a private delivery service the corrected version to the Attorney General. Not until much later when the package was returned by the service did it appear that the Petition was not delivered because of the absence of a suite number from the address.

In none of the three versions of the Petition was there any content change, and the copy received by the Attorney General on August 29, 1988 was the same as the one received by him on December 28, 1988. Only the Appellate opinion was retyped. Counsel apologized to opposing counsel for the oversight of the copying service and only used that method of sending the corrected copies to opposing counsel because he thought it would speed

delivery of the corrected copy as soon as it was completed.

In no instance was there intended a cavalier disregard of the rules of this court or any prejudice to the Attorney General.

III

CONCLUSION

Inasmuch as Respondents have not addressed the issues raised by the Petition, let alone answered them, Petitioners have nothing to add to the Petition except as noted herein.

Dated: January 13, 1989

Thomas M. Burton

PROOF OF SERVICE

I am a citizen of the United States, and am over the age of eighteen (18) years. I reside and am employed in Pleasanton, California and am not a party to the within action; my business address is 5820 Stoneridge Mall Road, Suite 100, Pleasanton, California 94566.

On _____, 1989, I served the within:

Reply Brief

in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Pleasanton, CA., addressed as follows:

Randall B. Christison

Deputy Attorney General

110 West A Street, Suite 700

San Diego, CA 92101

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____, 1989 at Pleasanton, California.

_____

Thomas M. Burton